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No. 85-1101

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

BURBANK-GLENDALE-PASADENA
AIRPORT AUTHORITY,
Petitioner,
vs.
KENNETH L. BAKER, et al.,
Respondents.

BRIEF OF AMICUS CURIAE CITY OF LOS ANGELES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 36, the City of Los Angeles, California, a municipal corporation, acting by and through its Board of Airport Commissioners, respectfully submits this brief, *Amicus Curiae,* in support of the Burbank-Glendale-Pasadena Airport Authority's Petition for Writ of Certiorari.

Counsel of Record for all parties have consented to the filing of this brief. Copies of the consent letters are filed herewith and contained in Appendix A.

INTEREST OF AMICUS CURIAE CITY OF LOS ANGELES

Your *amicus curiae,* City of Los Angeles, owns and operates Los Angeles International Airport (LAX), the world's third busiest commercial airport serving approximately 37 million annual passengers; Ontario International Airport (ONT), serving approximately 3.4 million annual passengers; and Van Nuys Airport (VNY), the world's busiest general aviation airport. LAX and ONT each serve the entire western region of the United States, and they have a major impact on interstate commerce and the economy of southern California and the western region. LAX accommodates the operations of numerous foreign flag carriers as well as every major domestic trunk air carrier operating in the United States, and it is the southern terminus of one of the most heavily traveled air corridors in the world.

As a result of court determinations regarding liability, the City of Los Angeles has expended approximately $30 million to satisfy judgments and to resolve litigation involving noise related inverse condemnation and nuisance actions at LAX. The City has thereby acquired avigation easements in approximately 800 properties, the majority of which are residential. Additionally, since 1965, the City of Los Angeles has acquired approximately 396 acres of land in the vicinity of LAX where noise was one of the paramount considerations for the acquisition of the property interests. The approximate cost for the fee acquisition of these property interests was $95,000,000.

Currently, nineteen inverse condemnation and nuisance lawsuits involving LAX are pending against the City of Los Angeles. In these actions, approximately 750 plaintiffs have prayed for personal injury and emotional distress damages in excess of $17 million, and they have

prayed for approximately $23 million in damages involving approximately 440 properties. In addition, as the proprietor of ONT, the City of Los Angeles is also defending itself against noise related inverse condemnation and nuisance actions brought by approximately 800 plaintiffs alleging in excess of $35 million in damages to themselves and approximately 300 properties.

Moreover, in addition to the acquisition of avigation easements and the property interests described above, the City of Los Angeles has undertaken, among other measures, the following noise mitigation efforts at LAX in order to reduce the impact of jet aircraft noise in the surrounding communities:

1. Adopted a noise regulation requiring compliance with Federal Aviation Regulation (FAR) Part 36 noise standards by all affected aircraft.

2. Adopted and implemented various noise abatement procedures including, but not limited to, nighttime, over-ocean approach patterns.

3. Implemented a soundproofing program for residential properties.

4. Commenced the Airport Noise Control Land Use Compatibility (ANCLUC) Program (FAR Part 150) where the primary objective is to assess land uses and aircraft operational procedures in an effort to achieve land use compatibility and reduce noise impacts.

5. Constructed a 20-foot high by 1,500-foot long, well-landscaped sound barrier wall that substantially reduces aircraft noise at adjacent residential properties.

6. Adopted numerous other noise mitigation measures at ONT and VNY.

The foregoing list is not exhaustive, but it is meant to illustrate some of the measures instituted by the City of Los Angeles as an airport proprietor that has been held by the courts to have the sole responsibility for the damages caused by aircraft noise at its airports. *Griggs v. County of Allegheny,* 369 U.S. 84 (1962).

However, notwithstanding the City of Los Angeles' efforts to reduce the impact of jet aircraft noise in the communities surrounding LAX, ONT and VNY, this City has not succeeded in protecting itself from litigation. For example, in *Iglarsh v. City of Los Angeles,* Los Angeles Superior Court No. C 278471, five families living in the homes that benefited most by the sound barrier wall alleged not only property and personal injury damages in excess of one million dollars, but further alleged that the well-landscaped wall was an eyesore that depreciated their property values. Moreover, in a number of current lawsuits, homeowners that previously recovered damages from, and granted avigation easements to the City of Los Angeles, have sued the City a second time alleging that the City's direct condemnation efforts reduced the value of their properties. (Residents in the vicinity of LAX are not the only parties that have instituted litigation against the City of Los Angeles relative to noise issues. The City was also sued when it attempted to enforce its noise regulation implementing FAR Part 36 noise standards. *Empresa Ecuatoriana De Aviacion v. City of Los Angeles, et al.,* United States District Court for the Central District of California, No. 85-811 HLH.)

In short, a complete review of noise abatement measures and jet noise litigation involving LAX would reveal that barriers, buffers, easements, and other noise reduc-

ing devices have not insulated the City of Los Angeles from lawsuits or liability.

Additionally, the State of California, through its existing regulatory authority, actively encourages airport operators, including the City of Los Angeles, to take positive steps to reduce the noise impacts resulting from airport operations. (21 Cal.Admin.Code §§ 5000-5080 (1977).) It should be noted however, that consistent with *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the courts have upheld the State's regulatory authority only when it has involved monitoring, shielding, ground level facility configurations, and development of compatible land uses. *Air Transportation Association of America v. Crotti,* 389 F. Supp. 58 (1975); *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981) (the State may not dictate aircraft operational procedures).

Nevertheless, and notwithstanding the existing rights afforded to local residents and the State to encourage noise mitigation efforts, the California Supreme Court now further allows local residents to bring successive actions for damages against airport proprietors in a federally preempted area for an activity that cannot be abated. *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862 (1985). (Prior to *Baker*, plaintiffs in California already enjoyed the right to bring actions at law sounding in inverse condemnation and/or nuisance to recover just compensation for the taking or damaging of their property and for personal injury and emotional distress. *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86 (1980); *Aaron, et al. v. City of Los Angeles*, 40 Cal.App.3d 471 (1974); *Griggs v. County of Allegheny*, 369 U.S. 84 (1962).)

Your *amicus curiae* has set forth its interest in this case and submits that the decision below will allow non-proprietary regulation of aircraft operations. Therefore, it is respectfully requested that this Court adopt the dissenting opinion by Justice Mosk below in *Baker* wherein he stated that the majority's disposition of the nuisance cause of action potentially subjects the "airport to repeated and vexatious litigation based on the same nuisance." 39 Cal.3d at 874.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement.

Your *amicus curiae*, City of Los Angeles, adopts by reference the brief of Petitioner, Burbank-Glendale-Pasadena Airport Authority in the Petition for Writ of Certiorari.

2. The Decision Of The California Supreme Court Is Tantamount To State Regulation Of Airport Operations, Is In Violation Of The Supremacy Clause And Is Contrary To This Court's Decision In *City of Burbank*.

The California Supreme Court has acknowledged the airport proprietor's inability to abate the nuisance created by aircraft operations. In this regard, the Court stated that "... federal law precluding interference in any way with flight patterns and schedules adds an element of permanency to an otherwise continuing problem ...." *Baker*, 39 Cal.3d at 873. The same Court also stated the following in *Greater Westchester Homeowners Assn. v. City of Los Angeles*, 26 Cal.3d 86 (1980):

> "[C]ommercial flights which are conducted in strict compliance with federal regulations may not be en-

> joined as nuisances, both because of the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law." 26 Cal.3d at 94.

Nevertheless, the California Supreme Court has opined below that:

> "... [D]espite the fact that the flights to and from the airport are privileged, defendant shoulders an affirmative responsibility to minimize noise levels through the use of buffers, barriers or noise reducing devices." 39 Cal.3d at 873.

However, as the facts described above illustrate, and what the California Supreme Court does not address or recognize, is that remedial measures, such as barriers, buffers, and other devices, do not minimize noise levels so as to insulate airport proprietors from continuous litigation and liability. Jet noise can only be abated through the cessation or reduction of aircraft operations. Further, because injunctive relief is unavailable to abate aircraft operations, the decision to allow continuing liability for the same nuisance can only be viewed as an attempt by the State Court to allow third parties to coerce desired operational decisions through repetitive litigation.

The California Supreme Court readily admits that its decision is meant to encourage airport proprietors to take remedial noise control measures (*Baker*, 39 Cal.3d at 873). However, as described herein, available judicial remedies and the existing State noise statutes (21 Cal.Admin.Code §§ 5000-5080), already operate to encourage the type of remedial noise control efforts recommended by the Court in *Baker*. Therefore, it is submitted that the true impact of the decision will allow third parties to regulate aircraft operational procedures

through judicially created economic coercion. In other words, the decision below will allow third parties and the State of California, through the courts, to control indirectly what they cannot control directly, and the result will be contrary to this Court's decision in *City of Burbank,* 411 U.S. 624, 639, wherein it was recognized that non-proprietary control of aircraft operations would be detrimental to air commerce.

> "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow." 411 U.S. at 639.

Additionally, as the dissent in *Baker*, 39 Cal.3d 862, 876 recognized:

> "*City of Burbank* plainly established that the delicate federal/local-proprietor noise control scheme currently in effect will not tolerate private suits seeking mandatory imposition of local noise controls. (Cf. *San Diego Unified Port Dist. v. Gianturco* (9th Cir. 1981) 651 F.2d 1306, 1316-1319, cert. denied (1982) 455 U.S. 1000 [71 L.Ed.2d 866, 102 S.Ct. 1631] [state may not direct an airport proprietor to exercise its noise abatement power].)" 39 Cal.3d at 876.

Moreover, in addition to the foregoing, this Court has made it clear that a state court's imposition of damages in a federally preempted field is tantamount to state regulation or judicial injunction, and such conduct by a state court violates the Supremacy Clause of the United States. *San Diego Building Trades Council, Local 2020 v. Garmon*, 359 U.S. 236 (1959); *Chicago and North Western Transportation Co. v. Kalco Brick & Tile Co.*, 450 U.S. 311 (1981).

CONCLUSION

Federal laws and regulations have preempted non-proprietary control of aircraft operations, and such operations cannot be judicially enjoined or regulated. Nevertheless, residents in the State of California have adequate remedies at law for recovering damages caused by jet aircraft noise, and the State of California, through its legitimate regulatory powers, has the ability to encourage the use of buffers, barriers and other noise reducing devices at California airports.

In light of the foregoing, it is respectfully submitted that the California Supreme Court's attempt to coerce these same remedial measures through repetitive, vexatious litigation amounts to impermissible State regulation of aircraft operations and is a violation of the Supremacy Clause.

It is further respectfully requested that this Court resolve the split in authority that exists between the California Supreme Court decision allowing repetitive nuisance claims and the Seventh Circuit in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975), in favor of the Seventh Circuit where the court ruled that "... to the extent they comply with ... federal laws and regulations," airport proprietors cannot "be charged with negligence or creating a nuisance." 521 F.2d at 391.

The precepts of *City of Burbank*, and the congressional policies that have established the delicate federal/local-proprietor noise regulatory scheme will be best served if the power to regulate and control aircraft operations and noise remains with the federal government and the air-

port proprietor, and not with third parties, including state courts.

DATED: January 21, 1986

Respectfully submitted,

JAMES K. HAHN
City Attorney
JAMES H. PEARSON
Senior Assistant City Attorney

By EMILY A. STEVENS
Deputy City Attorney
Attorneys for Amicus Curiae,
City of Los Angeles

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January 9, 1985

Mr. John J. Schimmenti
Schimmenti, Berberian & De Natale
999 North Sepulveda Boulevard
Suite 602 Airport Imperial Towers
El Segundo, CA 90245

Re: Burbank-Glendale-Pasadena Airport Authority, Petitioner, vs. Kenneth L. Baker, et al. Respondents.

Dear Mr. Schimmenti:

The City of Los Angeles, by and through its Board of Airport Commissioners, requests your written consent to its filing of a brief amicus curiae in support of the Petition for Writ of Certiorari in the above-referenced matter.

If Respondents consent to this request, please so indicate in the space provided below and return the original of this letter to the undersigned so that it may be presented to the Court.

Very truly yours,

JAMES K. HAHN, City Attorney

By Emily A. Stevens
EMILY A. STEVENS
Deputy City Attorney

Consent is hereby given to participation by the City of Los Angeles, by and through its Board of Airport Commissioners, as amicus curiae before the Supreme Court of the United States in the case of Burbank-Glendale-Pasadena Airport Authority, Petitioner, vs. Kenneth L. Baker, et al., Respondents.

Dated: 1/13/86

John J. Schimmenti
Counsel of Record
for Respondents

APPENDIX A1

JAMES H. PEARSON
SENIOR ASSISTANT CITY ATTORNEY

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January 9, 1985

Mr. Richard K. Simon
Counsel of Record
Kadison, Pfaelzer, Woodard,
Quinn & Rossi
707 Wilshire Blvd.
Fortieth Floor
Los Angeles, CA 90017

Re: Burbank-Glendale-Pasadena Airport Authority, Petitioner, vs. Kenneth L. Baker, et al. Respondents.

Dear Mr. Simon:

The City of Los Angeles, by and through its Board of Airport Commissioners, requests your written consent to its filing of a brief amicus curiae in support of the Petition for Writ of Certiorari in the above-referenced matter.

If Petitioner consents to this request, please so indicate in the space provided below and return the original of this letter to the undersigned so that it may be presented to the Court.

Very truly yours,

JAMES K. HAHN, City Attorney

By Emily A. Stevens
EMILY A. STEVENS
Deputy City Attorney

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Dated: January 13, 1985

Richard K. Simon
Counsel of Record
for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 21, 1986, I served the within Amicus Curiae Brief in re: "Burbank-Glendale-Pasadena Airport Authority v. Kenneth L. Baker" in the United States Supreme Court, October Term, 1985, No. 85-1101,

on the Attorneys in said action, by placing 3 copies thereof enclosed in sealed envelopes with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Mr. John J. Schimmenti
Schimmenti, Berberian & De Natale
999 North Sepulveda Boulevard
Suite 602 Airport Imperial Towers
El Segundo, CA 90245

Mr. Richard K. Simon
Counsel of Record
Kadison, Pfaelzer, Woodard, Quinn & Rossi
707 Wilshire Boulevard
Fortieth Floor
Los Angeles, CA 90017

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 21, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA